No. 92-1911

(16)

In The

Supreme Court of the United States

October Term, 1993

PUBLIC UTILITIES DISTRICT NO. 1 OF JEFFERSON COUNTY AND CITY OF TACOMA,

Petitioners,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, DEPARTMENT OF FISHERIES, AND DEPARTMENT OF WILDLIFE,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Washington

BRIEF FOR *AMICI CURIAE* STATES OF VERMONT, NEW YORK, ARIZONA, ARKANSAS, CALIFORNIA, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, TENNESSEE, TEXAS, UTAH, VIRGINIA, WEST VIRGINIA, WISCONSIN, WYOMING IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

The States submit this brief in support of the State of Washington, Department of Ecology, Department of Fisheries, and Department of Wildlife. This case involves the water quality certification for the proposed Elkhorn

hydroelectric dam, issued to petitioners by the State of Washington under the authority of Clean Water Act ("CWA") § 401, 33 U.S.C. § 1341, on condition that a minimum streamflow be maintained below the dam. Petitioners challenge the State's authority under § 401 to impose the minimum streamflow condition. Petitioners' position, if adopted, would impair the States' ability to ensure compliance with federally mandated and approved water quality standards, through certification proceedings, one of the principal means of implementing the Act's objective to maintain and restore the chemical, biological, and physical integrity of the nation's waters. CWA § 101(a), 33 U.S.C. § 1251(a). In enacting the certification provision in 1970 and amending it in 1972, Congress granted the States authority to enforce the new pollution control provisions and correspondingly limited the power of the Federal Energy Regulatory Commission ("FERC") under the Federal Power Act ("FPA"), which had originally been enacted in 1920. Congress "was aware that the 1972 enactment would have far-reaching consequences and recognized that some other legislative objectives would have to be reconciled with the new pollution control efforts." *Monongahela Power Co. v. Marsh*, 809 F.2d 41, 46 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 816 (1988).[1]

The States do not maintain that all hydroelectric projects should not be approved. Indeed, the State involved

[1] The courts have also recognized this, saying, "It can hardly be said that the prescription of additional requirements for hydroelectric projects was an utterly unforeseen or inappropriate consequence." *Monongahela Power Co.*, 809 F.2d at 46.

here, Washington, did not deny a § 401 certification to the project at issue. Neither do the States maintain that all existing hydroelectric dams, such as those involved in the hundreds of relicensing applications FERC will process in the next decade, should be dismantled.[2] The States submit, however, that hydroelectric projects must comply with the Clean Water Act so that compliance with State water quality standards is ensured. Consequently, this Court should affirm the judgment of the Washington Supreme Court.

[2] Even though this case arises from an application to construct a new hydroelectric facility, many States are also concerned about the relicensing applications which are clearly subject to the Clean Water Act's requirements. As Congress provided:

> In exercising its responsibilities in relicensing, the conferees expect FERC to take into account existing structures and facilities in providing for these nonpower and nondevelopmental values. No one expects FERC to require an applicant to tear down an existing project. But neither does anyone expect 'business as usual'. Projects licensed years earlier must undergo the scrutiny of today's values as provided in this law and other environmental laws applicable to such projects. FERC should exercise its authority to restrict or, particularly in the case of original licenses, even deny a license on a waterway. The goal of amended § 4 is to assure a true multiple use of water resources.

H.R. Conf. Rep. No. 99-934, 99th Cong., 2d Sess., 4 U.S. Code & Cong. Admin. News ("USCCAN") 2537, 2538 (1986).

The Clean Water Act regulates dams[3] because they may cause significant water quality problems.[4] For example, dams may alter a river's natural aeration potential, causing dissolved oxygen deficits.[5] Their operation may also cause river flow to fluctuate. Drops in flow may concentrate wastes discharged into a river downstream of a dam to unacceptable levels.[6]

Dams may also alter and in some cases destroy ecosystems. Dams may slow, capture, hold and divert a river's free flow, flood the upstream river channel, and have varying impacts on temperature and down-stream flow. Existing habitat is destroyed or significantly altered, thus affecting the health and composition of the aquatic biota. Dams are usually located to take advantage of natural drops in elevation. The fast-flowing water resulting from a drop in elevation is a necessary component of

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[3] Petitioners propose to construct a "10 foot diversion weir" across the full width of the Dosewallips River. Pet. Br., p. 10. A "weir" is defined as "[a] dam across a stream to raise the water, or to convey it to a mill." New Webster's Dictionary 1762 (Coll. ed. 1975).

[4] *See, e.g., Hydropower in Vermont, An Assessment of Environmental Problems and Opportunities,* Alison M. DesMeules and Cynthia Parks, Vermont Agency of Natural Resources (May 1988). *See, also, National Wildlife Federation* v. *Gorsuch,* 693 F.2d 156, 161-64 (D.C. Cir. 1982) (dams effect chemical changes to rivers such as lowering dissolved oxygen levels, altering mineral and nutrient levels, trapping sediment, changing temperature, and supersaturation).

[5] *See, Simpson Paper (Vermont) Co., Inc.* v. *Vermont Department of Environmental Conservation and Sierra Club,* No. 92-1012.

[6] Such problems are experienced on the Blackstone River in Rhode Island.

a healthy river. Such water is highly oxygenated and washes away silts, thus providing a gravel substrate necessary for spawning areas and insect production. The diversion of water eliminates natural flows in reaches that the diversion bypasses ("bypass reach"). Bypass reaches often run for several miles,[7] thus affecting significant lengths of rivers.

The Statutory Framework

A. The Clean Water Act

"The objective of the [Clean Water Act] is to restore and maintain the chemical, physical, and biological integrity of the nation's waters." CWA § 101(a), 33 U.S.C. § 1251(a). The word "integrity . . . refers to a condition in which the natural structure and function of the ecosystem is maintained." H.R. Rep. No. 92-911; 92nd Cong., 2d Sess., 76-77, *reprinted in* 1 Legislative History of the Federal Water Pollution Control Act Amendments of 1972 753-64 (1972).

The substantive requirements of the Clean Water Act are established through water quality standards ("WQS") setting forth ambient water quality requirements. The standards must be adopted by the States in conformity with Clean Water Act § 303 and EPA rules. CWA § 303, 33 U.S.C. § 1313; 40 CFR 131.10 (1983). EPA must promulgate standards applicable in States that fail to promulgate such standards. CWA § 303(b), 33 U.S.C. § 1313(b). The standards are considered to be federal law. *Arkansas v. Oklahoma,* 503 U.S. ___, 112 S.Ct. 1046, 1059 (1992).

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[7] The bypass reach in this matter would be 1.2 miles.

The water quality standards are implemented through three programs established by the Act. First, the Act regulates the "discharge of pollutants" through the National Pollutant Discharge Elimination System.[8] CWA § 402, 33 U.S.C. § 1342. Second, the Act regulates the modification or destruction of aquatic habitat by prohibiting the discharge of dredged or fill material unless permitted. CWA § 404, 33 U.S.C. § 1344. Third, the Act requires EPA and the States to implement programs assuring that other impacts to water quality, *i.e.*, those from nonpoint sources of pollution, comply with water quality standards. CWA §§ 208(b), 304(f), 319, 33 U.S.C. §§ 1288(b), 1314, 1329; *National Wildlife Fed. v. Consumers Power Co.*, 862 F.2d 580, 588 (6th Cir. 1988).

The water quality standards are applied to federally licensed projects through § 401 of the Clean Water Act, 33 U.S.C. § 1341. Section 401 requires an applicant for a federal license authorizing any activity that may cause any discharge to obtain State certification that the discharge will comply with specified water quality requirements established under the Act. 33 U.S.C. § 1341(a)(1). A certification may also include limitations necessary to comply with water quality standards "and with other appropriate requirements of State law." 33 U.S.C. § 1341(d). Such limitations become conditions on the federally issued license. *Ibid.*; *Roosevelt Campobello Park*

[8] The term 'pollutant' means "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, heat, wrecked or discarded equipment, rock, sand, cellar direct and industrial, municipal, and agricultural waste discharged into water." CWA § 502(6), 33 U.S.C. § 1362(6).

Comm. v. EPA, 684 F.2d 1041, 1056-1057 (1st Cir. 1982). Denial of certification by a State precludes issuance of the federal license as a matter of law.[9] CWA § 401(a)(1), 33 U.S.C. § 1341(a)(1).

B. The Federal Power Act

Section 4(e) of the FPA empowers FERC to issue licenses for projects "necessary or convenient . . . for the development, transmission, and utilization of power across, along, from, or in any of the streams . . . over which Congress has jurisdiction". 16 U.S.C. § 797(e). Section 10(a) of the Act also authorizes FERC to issue licenses subject to conditions FERC deems best suited for power development and other public uses of the waters. 16 U.S.C. § 803(a). These sections also expressly direct that FERC consider a project's effect on fish and wildlife as well as "power and development purposes". 16 U.S.C. §§ 797(e), 803(a).

SUMMARY OF ARGUMENT

The decision of the Washington Supreme Court upholding the State's imposition of a minimum streamflow condition in the water quality certification issued for the Elkhorn hydroelectric project should be affirmed for

[9] Congress gave the States direct and primary responsibility for the § 401 water quality certification program. CWA § 401(a)(1), 33 U.S.C. § 1341(a)(1). However, EPA is required to issue certifications where a State does not have the authority to do so. *Ibid.*

several reasons. First, the Federal Power Act does not preempt a State's authority under Clean Water Act § 401 to impose a minimum streamflow condition to assure compliance with State water quality standards. The Federal Power Act and the Clean Water Act provide complementary, not conflicting, roles for both the federal and state governments. Section 401's limitation on FERC is only one of a number of limitations enacted in the interim since passage of the Federal Power Act of 1920. Section 401 provides a meaningful role to the States and allows them to apply every part of their water quality standards, including designated uses, criteria, and the antidegradation policy, as well as appropriate requirements of State law authorized by § 401, to a project.

Second, it is beyond question that Washington has § 401 jurisdiction over the construction and operation of the hydroelectric project at issue. EPA has interpreted § 401 as applying to projects like the one at issue here, recognizing that the authority granted to the States by § 401 to address the water quality impacts of such projects is not limited to dealing with discharges from point sources. EPA's consistent and rational interpretation is entitled to deference by this Court. In 1970, Congress provided that federally licensed activities that may result in any discharge must comply with water quality standards. Congress characterized the 1972 amendments, which provided that the discharge must comply with water quality standards and other provisions of the Clean Water Act, as merely reflecting the Clean Water Act's additional emphasis on effluent limitations. In 1977, Congress confirmed that the 1972 change was not substantive, describing the provision as one which required

federally licensed activities to comply with the water quality standards.

Third, petitioners' argument that only one part of a water quality standard, the chemical, numeric criteria, is enforceable, ignores the other two very important components of water quality standards (the designated uses and the antidegradation policy), is at odds with the plain meaning of the statute, and is contrary to EPA's consistent and historical interpretation.

Fourth, the court properly held that a State could impose a minimum streamflow condition in a water quality certification to assure compliance with water quality standards. Washington's minimum streamflow requirement enforced its antidegradation policy, an essential element of its EPA-approved water quality standards.

Fifth, Washington's minimum streamflow statute is an "appropriate requirement of State law" within the meaning of Section 401(d) which a State may apply when imposing conditions in a water quality certification. Washington acted within the authority § 401 granted to the States when, in imposing conditions to assure compliance with State water quality standards, it applied its base flow statute which directed retention of base flows necessary to provide for preservation of, *inter alia*, fish and imposed the minimum streamflow condition at issue here.

ARGUMENT

The Minimum Streamflow Condition Washington Imposed In Its Water Quality Certification Should Be Affirmed Because It Is Authorized By Clean Water Act § 401

1. FERC's Jurisdiction Here Is Not Exclusive; Various Federal Statutes, Including Section 401 Of The Clean Water Act And The Federal Power Act, Provide Complementary Roles For Federal And State Agencies

Subsequent to enactment of the Federal Power Act of 1920, Congress accomodated federal and state environmental and natural resource concerns by enacting a variety of provisions limiting FERC's power. The power granted the States under Clean Water Act § 401 is only one of these limitations. For example, Congress requires FERC, like all other federal agencies, to comply with the provisions of various federal environmental and natural resource laws, including the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, the Fish and Wildlife Coordination Act, 16 U.S.C. § 661 *et seq.*,[10] the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*, the Wild and Scenic Rivers Act, 16 U.S.C. § 1271 *et seq.*, the Federal Lands Management Policy Act ("FLMPA"), 43 U.S.C. § 1761 *et seq.*, and the Clean Water Act. Congress requires FERC to respect the determinations of various federal

[10] *See, Washington State Dept. of Fisheries v. FERC*, 801 F.2d 1516 (9th Cir. 1986) (FERC must comply with Fish and Wildlife Coordination Act); *see also, Udall v. FPC*, 386 U.S. 428 (1967) (FPC must explore wildlife conservation aspect of hydroproject).

environmental and natural resource agencies, including the Departments of Commerce and Interior for matters within their jurisdiction, such as protection of Indian reservations, fisheries, and public lands. *See, Escondido Mutual Water Co. v. LaJolla Indians*, 466 U.S. 765, 772-779 (1984), holding that FERC was required by FPA § 4(e), 16 U.S.C. § 797(e), to include the Secretary of Interior's conditions in its hydroelectric licenses with respect to projects located within Indian reservations under his supervision.[11] *See also*, the FLMPA, 43 U.S.C. § 1761 *et seq.*, as amended by P.L. 102-486, 106 Stat. 3096-3097, Tit. XXIV, § 2401, overturning holding in *California and Henwood Associates Inc. v. FERC*, 966 F.2d 1541, 1561 (9th Cir. 1992), that the Bureau of Land Management had no authority to require right-of-way permit for hydroelectric projects involving public lands; *see also*, 16 U.S.C. § 811, as clarified by P.L. 102-486, 106 Stat. 3008, Title XVII, § 1701(b), vacating FERC's rule narrowly interpreting "fishway" and providing that any future definition promulgated by FERC "shall have no force and effect unless

[11] The conditions challenged in the *Escondido* case, like that in this case, also dealt with water quantity issues. *Escondido* involved requirements that certain Indian Tribes be allowed to use a specified quantity of the water which otherwise would have been used by the licensees. 466 U.S. at 772.

In *Escondido*, this Court stated that the standard of review applied to conditions imposed by federal land management agencies in FERC proceedings is whether they are reasonably related to the goal of protecting resources on federal reservations. 466 U.S. at 777-778. This Court should apply an analogous standard when reviewing the condition imposed here under Section 401: whether the condition is reasonably related to the goal of ensuring compliance with water quality standards.

concurred in by the Secretaries of Commerce and Interior." As can be seen, Congress has used a variety of legislative techniques when imposing these limitations, at times specifically mentioning FERC, and at other times merely imposing a uniform compliance requirement on all federal agencies and not including any special exception or exemption for FERC.

Section 401 is not the only limitation on FERC contained in the Clean Water Act.[12] Section 404, which imposes a permit requirement regulating the discharge of dredged or fill material, also imposes a limitation on FERC's authority. The courts have repeatedly held that 404's permit requirement applies to projects licensed by FERC. *Scenic Hudson Preservation Conference v. Calloway*, 499 F.2d 127 (2d Cir. 1974) (§ 404 applies to hydroelectric project licensed by FPC); *Monongahela Power Co.*, 809 F.2d at 47 (§ 404 applies to FERC-licensed hydroproject because no provision in FPA or § 404 exempts such projects from 404's permitting requirements; if Congress did not like result in *Scenic Hudson*, it could have changed 404 when enacting 1977 amendments to Water Act, but did not do so).

When the certification requirement was first enacted, Senator Edmund Muskie called it "the most important section" of the 1970 water pollution legislation and then said:

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[12] Petitioners' reliance on CWA § 101(g), 33 U.S.C. § 1251(g), is misplaced. That section clarifies that the Clean Water Act shall not interfere with a State's authority to allocate quantities of water. That section is therefore inapplicable to this case.

> No polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standards. No polluter will be able to make major investments in facilities under a Federal license or permit without providing assurance that the facility will comply with water quality standards.

Cong. Rec. Senate, p. 8984, March 24, 1970.[13]

As discussed *infra*, there is no doubt that Section 401 applies to FERC's hydroelectric licensing activities. As Congress stated:

> This section is substantially section 21(b) of existing law . . . [Section 401] continues the authority of the State or interstate agency to act to deny a permit and thereby prevent a federal license or permit from issuing to a discharge source within such State or jurisdiction of the interstate agency. Should such an affirmative denial occur no license or permit could be issued by such Federal agencies as the Atomic Energy Commission, *Federal Power Commission*, or the Corps of Engineers unless the State action was overturned in the appropriate courts of jurisdiction.

S.R. Rep. No. 92-414, 92d Cong., 1st Sess., *reprinted in* 2 USCCAN 3735 (1972) (emphasis added).[14]

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[13] Senator Muskie was the chief sponsor of the Water Quality Improvement Act of 1970, which contained the Section 21(b) certification requirement. *See, New Hampshire v. Atomic Energy Commission*, 406 F.2d 170, 176 (1st Cir. 1969), *cert. denied*, 395 U.S. 962 (1969).

[14] As discussed later in this brief in the "discharge" argument, if Congress were making a major change in the

The 1986 Electric Consumer Protection Act amendments[15] ("ECPA") to the Federal Power Act did not alter the federal-state relationship created by the certification requirement; they merely confirmed FERC's responsibility to give "equal consideration" to non-development issues, including environmental ones, and provided specific procedures for fulfilling that responsibility. This pointed clarification did not impliedly repeal Section 401's applicability to FERC.

> [T]he bill does not amend or change the Fish and Wildlife Coordination Act, NEPA *or other environmental laws*. It addresses and clarifies FERC's procedures and decisionmaking to ensure that those laws are fully met.

H.R. Rep. 99-507, 99th Cong. 2d Sess., *reprinted in* 4 USCCAN 2508 (1986) (emphasis added).[16]

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certification jurisdictional trigger and narrowing that jurisdiction from regulating the water pollution impacts of a project's activity to merely relating a point source discharge, surely Congress would not have characterized the 1972 certification provision as a non-substantive change and a continuation of the States' authority under the 1970 Act.

[15] P.L. 99-495, 100 Stat. 1243, 16 U.S.C. §§ 797(e), 803(a).

[16] The Report also explicitly stated that the amendments did not alter the judicial decisions issued in various cases requiring FERC to comply with different laws, including *Escondido Mutual Water Co.*, 466 U.S. 765, *supra*, (FERC bound to accept terms and conditions from Federal land managers to protect resources on Federal lands), *Confederated Tribes of the Yakima Nation v. FERC*, 746 F.2d 466 (9th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985), (FERC relicensing decision reversed because it failed to adequately consider fisheries matters and failed to prepare environmental impact statement), *Tulalip Tribes of Washington v. FERC*, 732 F.2d 1451 (9th Cir. 1984), (FERC

Thus, the ECPA amendments, which reinforce FERC's responsibilities regarding fish and wildlife, did not repeal or limit Clean Water Act § 303's directive that States adopt water quality standards which take "into consideration their use and value for . . . propagation of fish and wildlife". Congress instead enacted two statutes specifically requiring protection of fish and wildlife. A State fulfills its responsibility through its water quality standards and the enforcement of those standards in a water quality certification; FERC discharges its responsibility during the balancing process it undertakes during its licensing proceeding.

Further, if Congress felt that ECPA conflicted with Section 401, it had every opportunity to amend Section 401 to that effect when it enacted the Water Quality Act of 1987. It did not. To the contrary, Congress bolstered the Clean Water Act's mandate that nonpoint sources of pollution such as diversion dams are required to comply with water quality standards. CWA § 319, 33 U.S.C. § 1329.

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wrongly allowed new diversion projects to be included in its exemption program), *The Steamboaters v. FERC*, 759 F.2d 1382 (9th Cir. 1985), (FERC required to comply with NEPA) and similar cases which provided "guidance and redirection to the Commission". H.R. Rep. 99-507, 99th Cong., 2d Sess., *reprinted in* 4 USCCAN 2508 (1986). "The Committee intends that the Commission should adhere to the mandate of these cases." H.R. Rep. 99-507, *reprinted in* 4 USCCAN 2508. The House Conference report also stated that "There is no intention in any way to change the holdings in relevant cases, such as *Udall v. FPC*, which the conferees intend will continue to apply to FERC's hydroelectric program." H.R. Conf. Rep. 99-934, 99th Cong., 2d Sess., *reprinted in* 4 USCCAN 2537, 2538 (1986).

This Court's prior decision interpreting the scope of the Federal Power Act in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152 (1946), is of limited relevance here because it was decided prior to enactment of Section 401. Furthermore, unlike *First Iowa*, this is not a preemption case; this case involves construing two federal statutes to give effect to each.

Similarly, *California v. FERC*, 495 U.S. 490 (1990), is also of limited relevance to this case because Section 401 was not involved in that case and because this case, unlike *California v. FERC*, does not involve proprietary rights or a State water rights permit. In that case, California issued a water right permit to a FERC licensee five years after FERC had issued its license. The State's license imposed a minimum flow condition different from the minimum flow condition FERC had previously imposed.[17]

This Court, applying the doctrine of *stare decisis*, held that FPA § 27 did not save California's streamflow condition because such instream flows are not proprietary rights under California law, and therefore were not specifically saved by § 27. The Court cautioned, however, that:

> [j]ust as courts may not find State measures preempted in the absence of clear evidence that Congress so intended, so must they give full effect to evidence that Congress considered and

[17] This is a dramatically different procedure from that used by a state exercising Section 401 jurisdiction. In the 401 situation, as the Washington court correctly stated, the State must make its certification determination prior to FERC's making its licensing determination. 18 CFR 4.38(f)(7) (1991).

> sought to preserve the States' coordinate regulatory role in our federal scheme.

495 U.S. 497. Congress crafted precisely such a coordinate regulatory role for the States in the federal regulatory scheme for hydroelectric projects when it enacted Section 401. Furthermore, Section 401 is the kind of "express congressional command" outside of the Federal Power Act that this Court found to be lacking in the *First Iowa* situation. *See, California v. FERC*, 495 U.S. at 501.

This Court has previously recognized that the "Clean Water Act anticipates a partnership between the States and the Federal government, animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters' ". *Arkansas v. Oklahoma*, 503 U.S. ___, 112 S.Ct. 1046 (1992). Section 401 is part of that partnership.

2. Washington Acted Within Its § 401 Authority When It Imposed The Streamflow Condition Because § 401 Regulates The Water Quality Impacts Of Hydroelectric Projects

Section 401 applies the Clean Water Act to federally licensed projects which may cause impacts to water quality. The plain language of § 401, its context within the Clean Water Act, and its legislative history demonstrate that § 401 grants the States authority to regulate all water quality impacts of federally licensed projects regardless of whether the impact is caused by a discharge from a point or nonpoint source. In addition, EPA, the federal agency charged with administering and interpreting the Clean Water Act, and whose interpretation is therefore

entitled to deference, has interpreted § 401 as applying to the water quality impacts of hydroelectric projects, whether or not those impacts are caused by point or nonpoint sources. Petitioners' overly technical arguments[18] ignore the far-reaching purpose of the Clean Water Act and fail to recognize that a hydroproject's adverse water quality impacts emanate from both point and nonpoint source discharges. See, "Interest" section, *supra*.

The plain language of the Clean Water Act demonstrates that nonpoint source impacts of federally licensed projects come within the scope of § 401. The Clean Water Act's definition of "discharge", when used without qualification as it is in § 401, merely includes, but is not limited to, point source discharges. *Contrast*, 33 U.S.C. § 1362(12), which defines "discharge of pollutants" to "mean" the items thereafter listed, and § 1362(16), which defines "discharge" to "include" the items thereafter listed.[19] The term "any discharge" in § 401, then, clearly means that the States may deny or condition certification of *any* type of discharge on compliance with water quality standards.

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[18] *Environmental Defense Fund, Inc. v. Costle*, 657 F.2d 275, 292 (D.C.Cir.1981) held:

> Courts have held that the Clean Water Act is to be given a reasonable interpretation which is not parsed and dissected with the meticulous technicality applied in testing other statutes and instruments.

[19] All other definitions in § 502 use the all-inclusive term "means". Congress deliberately used different, less inclusive language in defining " 'discharge' when used without qualification".

Furthermore, § 401, in contrast with § 402, which regulates point source discharges, specifically requires compliance with the ambient based water quality standards established under Clean Water Act § 303, 33 U.S.C. § 1313. 33 U.S.C. § 1341(a)(1).[20] Nonpoint sources of pollution are governed by the water quality standards. *Consumers Power Co.*, 862 F.2d at 588. There would have been no need for Congress to specifically incorporate § 303's ambient standards into § 401 if, as suggested by the petitioners, § 401 was limited to regulating the point source discharge of pollutants.

Indeed, the Clean Water Act mandates that both point and nonpoint sources of pollution be managed to attain and maintain compliance with water quality standards.[21] CWA §§ 208(b)(2), 304, 319, 33 U.S.C. §§ 1288(b)(2), 1314, 1329. Pollution is defined as "the man-made or man-induced alteration of the chemical, physical, biological and radiological integrity of water." CWA § 502(19), 33 U.S.C. § 1362(19). A dam or diversion unquestionably is a man-made alteration of the chemical, physical, and biological integrity of water. Further, § 319 was added to the Clean Water Act through the Water Quality Act of 1987, which stated the following:

> it is the national policy that programs for the control of nonpoint sources of pollution be

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[20] Sections 401(a)(1) and 402 both incorporate §§ 301, 302, 306 and 307 by reference.

[21] Petitioners' assertion that a discharge "implies the concept of an addition of something to the receiving waters," pet. brief at 23, does not assist them. Congress recognizes that nonpoint sources "add" pollution to navigable waters. CWA § 319(a)(1)(B), 33 U.S.C. § 1329(a)(1)(B).

> developed and implemented in an expeditious manner so as to enable the goals of this Act to be met through the control of both point and nonpoint sources of pollution.

CWA § 101(a)(7), 33 U.S.C. § 1251(a)(7). *See, also, Consumers Power Co.*, 862 F.2d at 588 (Congress, in drafting the Water Quality Act of 1987, specifically focused on the water pollution problems caused by dams).

The Clean Water Act recognizes that "changes in the movement, flow, or circulation of any navigable waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities" are nonpoint sources of pollution. CWA § 304(f)(2)(F), 33 U.S.C. § 1314(f)(2)(F). Accordingly, EPA has listed hydrological modifications including channelization, dam construction, flow regulation or modification and streambank modification as one of the "major nonpoint source pollution categories." *Nonpoint Source Guidance*, U.S.E.P.A. (Dec. 1987); *see also*, Pet. App. at 8a. EPA's construction is reasonable and thus must be given controlling weight. *Arkansas v. Oklahoma*, 503 U.S. ___, 112 S.Ct. 1046, 1060 (1992); *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1983).

Moreover, § 401's legislative history indicates that Congress clearly intended § 401 to apply to nonpoint source discharges. The 1970 certification provision initially required the State to certify that the "activity" complied with water quality standards. *Compare*, former 33 U.S.C. § 1171(b), referred to as "Section 21(b)", with existing 33 U.S.C. § 1341, referred to as "Section 401". When the 1972 Clean Water Act amendments added a new emphasis on effluent limitations to control pollution

at its source, Congress characterized its revisions to § 401 – including a requirement that the discharge comply with various provisions of the Clean Water Act – as making no substantive changes in the provision other than to add the references to the new provisions of the Act. S. Rep. No. 92-414, 92d Cong., 1st Sess., *reprinted in* 2 USCCAN 3735 (1972). *See*, discussion in Section 1 of this brief. If Congress intended to narrow the provision's reach, rather than expand it, surely Congress would not have characterized the changes as a mere continuation of the provision. *See*, discussion, *supra*. Finally, in 1977, when Congress again amended § 401 to specifically incorporate § 303, it again characterized the provision as regulating federally licensed *activities* which may discharge into navigable waters. H.R. Rep. No. 95-370, 95th Cong. 1st Sess., *reprinted in* 3 USCCAN 4424, 4471 (1977).

EPA construes § 401 as the appropriate mechanism for States to address all water quality impacts caused by the operation of a hydroelectric facility:

> EPA, as the principal agency responsible for administering the CWA, has taken steps to support States as they consider the full range of water quality impacts when evaluating Federal permits under Section 401 and licenses, including hydropower licenses. The types of potential adverse impacts associated with hydropower projects include loss or degradation of aquatic habitat; impacts on wildlife, fisheries, and endangered species that are dependent on the aquatic environment; accumulation of contaminated sediments; nonpoint source impacts; water chemistry problems such as low levels of

> dissolved oxygen; significant changes in temperature; and significant changes in water flow volumes and timing.

Statement of Martha G. Prothro, Deputy Assistant Administrator for Water, EPA, before the Subcommittee on Environment, Energy and Natural Resources, of the House of Representatives (May 15, 1992) Appendix at 15a. *See also,* Pet. app. at 8a.

FERC has also consistently offered the view that § 401 may regulate the operation of existing dams. FERC endorsed § 401 conditions requiring spillage of water at the dam to redress dissolved oxygen problems caused by the dams and their operation in *OMYA, Inc.*, 62 FERC ¶ 62,224 (1993) and in *Environmental Assessment for Hydropower License,* Gilman Hydroelectric Project, No. 2392, FERC, Office of Hydropower Licensing (April 4, 1990), pending before this Court *sub nom., Simpson Paper (Vermont) Co., Inc. v. Vermont Department of Environmental Conservation and Sierra Club,* No. 92-1012. *See also* 18 CFR § 4.38(f)(7) (1991) (requiring applicants for relicensure to obtain § 401 certification).

Petitioners' claim that § 401 may govern tailrace discharges but not the pollution added by changes in the movement, flow, or circulation leads to absurd results. The Clean Water Act would not redress the water quality impacts caused by petitioners' project if § 401 precluded its applicability to the project's most severe impacts on water quality. Section 401 should not be construed to produce such an absurd result. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) (Interpretations of statute which would produce absurd results are to be

avoided if alternative interpretations consistent with legislative purpose are available); *Environmental Defense Fund v. Costle,* 657 F.2d 275, 292 (D.C. Cir. 1981) (Clean Water Act to be given reasonable construction).

Finally, the petitioners' argument does not realistically reflect the design and operation of hydroelectric dams. Section 401 applies to any federally licensed activity "which may result in any discharge into the navigable waters." 33 U.S.C. § 1341. The petitioners concede that the term "any discharge into the navigable waters" includes the discharge of impounded waters, Pet. brief at 23, but then assert that their diversion dam does not create a discharge. Pet. brief at 23. However, all hydroelectric dams are designed, built and operated so that they may discharge impounded waters over a spillway or through a sluice gate or other similar mechanism.[22] Indeed, the record reflects that the petitioners propose to discharge a minimum of 65 cubic feet per second of impounded waters from their dam. Pet. app. at 5a.

3. The Washington Court Properly Upheld The State's Reliance On The Designated Uses Element Of Its EPA-Approved Water Quality Standards

Petitioners erroneously claim (Pet. Br., p. 32) that designated uses, which are one element of State water quality standards, are mere goals that may be achieved only through the operation of criteria. CWA

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[22] *Design of Small Dams,* U.S. Bureau of Reclamation, 2d ed. (1973); Craeger and Justin, *Hydroelectric Handbook* 100, 346 (2d ed. 1965).

§ 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A). Under petitioners' misguided view, the absence of an applicable criterion allows the violation of a designated use. Criteria, however, are merely one means to an end; they are not the end in themselves. The designated uses are paramount.

Petitioners' claim is inapposite to § 401's plain language. Section 401(a)(1) expressly provides that a state may deny certification if a project will not "comply with applicable provisions of sections . . . 303." Petitioners concede these applicable provisions include the water quality standards. Pet. Br., p. 31.

Section 303 also fails to provide support for the petitioners' argument. It states that criteria are to be "based upon" designated uses; it does not say that criteria are the exclusive mechanisms to assure compliance with those uses. Indeed, EPA's regulations specifically require dams to be operated to attain designated uses, 40 CFR § 131.10(g)(4) (1991), and provide that "[w]hen criteria are met, water quality will *generally* protect the designated use." 40 CFR 131.3(b) (1991). (emphasis added). EPA recognizes there will be instances where the criteria are insufficient to protect the use and thus requires States to fashion limitations based directly on the use.

Most important, petitioners' argument represents a fundamental and dangerous departure from long established methods of implementing the Clean Water Act which allow States to protect designated uses even though they may not have adopted a specific criteria. For example, the Vermont Department of Fish and Wildlife's fish hatchery on Grand Isle in Lake Champlain holds a

§ 402 discharge permit regulating its discharge of antibiotics. *Amended Discharge Permit*, No. 3-1312, Vermont Dept. Env. Cons. (Sept. 24, 1992).[23] Because Vermont does not have any criterion applicable to antibiotics,[24] its Department of Environmental Conservation fashioned a case specific permit limitation "based on sound scientific[25] rationale and contain[ing] sufficient parameters . . . to protect the designated use" of Lake Champlain as a public drinking water supply. 10 Vt. Stat. Ann. § 1253(b); Vt. WQS § 3-03(A)(1) (1991); 30 CFR 131.11(a)(1) (1983). Petitioners' argument, if adopted, could preclude the protection of Lake Champlain and endanger its uses.

EPA has consistently interpreted § 401 and state obligations under the Clean Water Act to require the full implementation of the water quality standards.

> [P]rotection of water quality involves far more than just addressing water chemistry. Rather, protection of water quality includes protection of the multiple elements which together make up aquatic systems including the aquatic life,

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[23] The permit condition is as follows: "Terramycin – Use shall not exceed 3.75 g per 100 lb. of fish per day. The permittee shall report the dates and quantities used."

[24] Vermont and Washington have only 10 criteria. EPA established only 7 criteria in the water quality standards it promulgated for the Colville Confederated Tribes Indian Reservation. 33 C.F.R. § 131.35 (1989). These criteria are: enterococci bacteria, dissolved oxygen, dissolved gas, temperature, pH, turbidity, and toxics. They clearly do not cover all impacts to water quality.

[25] Washington similarly premised its streamflow condition on a sound scientific rationale. Pet. app. at 4a-5a, 24a-27a.

> wildlife, wetlands, and other aquatic habitat, vegetation, and hydrology required to maintain the aquatic system. Relevant water quality issues include the toxicity and bioaccumulation of pollutants, the diversity and composition of the aquatic species, entrapment of pollutants in sediment, stormwater and nonpoint source impacts, habitat loss, and hydrological changes.

Letter from LuJuana Wilcher, Assistant Administrator, EPA to Hon. Lois Cashell, Secretary, FERC (Jan. 18, 1991) (Pet. App. at 8a). As discussed earlier, EPA's interpretation is reasonable and is therefore conclusive. *Arkansas*, 503 U.S. ___, 112 S. Ct. at 1060.

4. The Washington Court Properly Upheld The State's Reliance On Its Antidegradation Policy As A Basis For Imposing The Streamflow Condition

Washington's imposition of a minimum streamflow condition based on its EPA-approved antidegradation standard was within the authority Congress gave the States in Section 401. The antidegradation policy is an essential element of a State's EPA-approved water quality standard. 40 CFR 131.12 (1983).

The antidegradation provision, insofar as it is relevant to this case, is used: (a) to protect and maintain existing instream uses[26] and the level of water quality

[26] "Existing uses" are those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water body standards. 40 CFR 131.3(e). "Designated uses", by contrast, are those uses specified in water quality standards for each water body or segment whether or not they are being attained. 40 CFR 131.3(f). In a nutshell, existing uses must be maintained and designated uses must be attained unless it is not feasible to do so. 40 CFR 131.10(g),(h).

necessary to protect them, and (b) to maintain and protect high quality waters – those waters where the quality meets or exceeds the level necessary to support the propagation of fish, shellfish, and wildlife and recreation in and on the water. 40 CFR 131.12(a)(1),(2).[27]

Under EPA's interpretation of the statute, the antidegradation standard is just as important an element of water quality standards as are the designated uses and the criteria. Furthermore, the antidegradation standard is just as important to protecting the designated uses as are the water quality criteria. It is the key to protecting existing uses and high quality uses. It is essential to attaining designated uses. In a word, it is indispensable.

EPA interprets the purpose of the antidegradation policy to prevent the State from permitting the degredation of water quality to the detriment of the existing use. 40 CFR 131.12(a). Washington's policy provides: "Existing beneficial uses shall be maintained and protected and no further degradation which would interfere with or become injurious to existing beneficial uses will be allowed". WAC 173-201-035(8)(a). In this case, the

[27] The policy also provides that high quality waters constituting an outstanding national resource, such as waters of national parks and wildlife refuges and "waters of exceptional recreational and ecological significance" are to be maintained and protected. 40 CFR 131.12(a).

existing beneficial, and designated, use is fish migration, rearing, spawning, and harvesting. WAC 173-201-045(1)(b)(iii). The Dosewallips River currently supports populations of salmon, steelhead and resident trout. To protect these populations, Washington applied its EPA-approved antidegradation standard to regulate streamflow in order to protect the existing fishery use.[28] It follows that the State had no choice under its federal antidegradation law but to impose the minimum flow requirement.

5. Washington Properly Relied On § 401(d)

The Washington court alternatively held that the base flow statute was an "other appropriate requirement of state law." Petitioners wrongly assert that § 401(d) did not authorize Washington to set a minimum flow condition necessary for compliance with its water quality standards. The base flow requirement is clearly related to the protection of water quality and the water quality standards. Consequently, under the standard of review established by this Court in *Escondido Mutual Water Co.*, 466 U.S. at 777-778, *i.e.*, whether the conditions are reasonably related to the goal of protecting water quality, imposition of the minimum streamflow condition was reasonable and should be affirmed.

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[28] It is of no moment that a program staff member, when inserting the minimum streamflow condition in the certification, incorrectly characterized the project as complying with water quality standards because the law, as interpreted by the courts, determines the scope of water quality standards.

If § 401(d) is to be given purpose, it must extend to state laws beyond the water quality standards. As evidenced by §§ 401(a) and (b), Congress knew how to specify provisions of the Clean Water Act for implementation through § 401. It did not opt in § 401(a)(1) to authorize the denial or conditioning of certifications based on specified provisions of the Act. Rather, it plainly chose to authorize states to assure compliance with "any other appropriate" state laws through § 401(d).

Finally, the word "appropriate" in § 401(d) limits the state laws that it may effectuate. Washington's statute providing that "[p]erennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values"[29] mirrors § 303's mandate that water quality standards protect a water's "uses and values for . . . propagation of fish and wildlife, recreational purposes . . . and [its] use for navigation." CWA § 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A). It would be hard to find a State law much more related to water quality standards. Washington's reliance on this requirement of state law was thus appropriate.

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[29] RCW 90.54.020(3)(a)

CONCLUSION

The judgment of the Washington Supreme Court should be affirmed.

Respectfully submitted,

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THE FEDERAL ENERGY REGULATORY COMMISSION'S HYDROPOWER LICENSING PROGRAM

HEARING
BEFORE THE

ENVIRONMENT, ENERGY, AND
NATURAL RESOURCES SUBCOMMITTEE
OF THE
COMMITTEE ON
GOVERNMENT OPERATIONS
HOUSE OF REPRESENTATIVES

ONE HUNDRED SECOND CONGRESS

SECOND SESSION

MAY 15, 1992

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CONTENTS

* * *

Mr. SYNAR. Thank you, doctor.

Martha Prothro, Welcome back. Ms. Prothro is the Deputy Assistant Administrator, Office of Water, at the U.S. EPA.

STATEMENT OF MARTHA G. PROTHRO, DEPUTY ASSISTANT ADMINISTRATOR, OFFICE OF WATER, U.S. ENVIRONMENTAL PROTECTION AGENCY

Ms. PROTHRO. Good morning Mr. Chairman. It is my pleasure to be here to discuss the role of EPA and the CWA in hydropower relicensing.

EPA's 1990 water quality inventory indicates only 63 percent of assessed rivers are today considered fishable and swimmable, the goals of the Clean Water Act.

Hydrologic and habitat modification as cited by States are the third leading cause of impairment of rivers. The goal of the Clean Water Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.

The CWA provides for water quality standards addressing all three of these characteristics of high quality waters – not only chemical integrity, but also the integrity of biological resources and the physical integrity of the water body. The Act also provides for State water quality certification of certain Federal permits or licenses.

These certifications are based on State water quality standards. If a license does not insure compliance with State standards, certification can be denied or conditioned.

EPA requires States to adopt standards with three basic components. First, the State is to designate the water uses that it wishes to protect for each of its waters, for example drinking water supplies, support of fish and wildlife, or recreational.

Second, the State is to adopt a criteria to protect those uses. Criteria may be numeric or narrative and they may relate to chemical, biological, or physical characteristics of the water.

Finally, the State must adopt an antidegradation policy to protect its high quality waters. Wherever attainable, States must strive to achieve fishable and swimmable water quality.

All States have established narrative criteria describing the water quality conditions to be achieved and most have a wide array of chemical specific numeric criteria for the water column. EPA has recently begun to emphasize that States should also include more specific criteria for habitat protection, criteria to help prevent contamination of sediments and criteria for the protection of wildlife. Some States are way ahead of us on this and we are using them as examples for other States to move forward.

Finally, States are to include antidegradation policies which should protect existing uses and existing water quality, especially for high quality and ecologically unique waters. EPA assists and guides the States in the certification process. We provide grant support, guidance, and sometimes technical input regarding the potential and environmental impacts of individual projects.

EPA supports States as they consider the full range of water quality impacts. Potential impacts associated with hydropower projects include loss or degradation of aquatic habitat; impacts on wildlife, fisheries, and endangered species that are dependent upon the aquatic environment; accumulation of contaminated sediments; nonpoint source runoff that pollutes the water; water

chemistry problems such as low levels of water of dissolved oxygen; significant changes in temperature; and significant changes in water flows.

FERC has questioned the extent of State certification authority, suggesting it may be limited to chemical integrity. The States have indicated their ability to enhance and protect water quality would be undercut if their authority to certify FERC licenses were limited.

Another issue of concern to States is the sometimes sporadic enforcements of section 401 conditions of FERC licenses. In response to State concerns and a letter sent to EPA by a FERC official, we wrote to FERC in January 1991 to clarify that the Clean Water Act does require more than just protecting the chemistry of the water column.

We also have responsibilities under section 404 of the Clean Water Act that relate mostly to licensing of new dams that involve dredge and fill activities. Those responsibilities are discussed more fully in my written testimony. And, of course we also have a role in the NEPA process.

The environmental applications of hydropower licenses are generally evaluated by FERC in their EIS's and environmental assessments under NEPA, and we do review those under the authority of NEPA and the Clean Air Act. Our recommendations, like those of State certifications, may increase projects costs in order to preserve current and future societal benefits produced by the natural resources we are charged to protect.

In the vast majority of cases it is possible to design or modify a project to produce energy and still achieve

environmental goals. By the year 1999, a large number of FERC licenses for existing hydropower projects will expire. We have been working with FERC to plan for this prodigious workload and we are hoping to establish some written agreement with FERC on the way we will interact in this process.

Our goal is to achieve both fish and environmentally responsible licensing for hydropower projects. We believe a written agreement will help us and we have some examples we can use as models, examples of agreements with other agencies.

Although FERC is reluctant to adopt some of the State certification conditions in its licenses, FERC now does consider biological and physical impacts on the Nation's waters. We feel this is a big step in the right direction. We feel that it is important to note that the American public has spent billions of dollars to abate pollution from industries and municipalities so public health would be protected, but also enjoyment of recreation in and on the waters would be possible and that ecological systems could be enhanced and protected. It makes little sense to insure water chemistry supports these goals if habitat destruction and hydro modification can readily defeat them.

I would be happy to answer any questions.

[The prepared statement of Ms. Prothro follows:]

STATEMENT OF
MARTHA G. PROTHRO
DEPUTY ASSISTANT ADMINISTRATOR
OFFICE OF WATER
U.S. ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE SUBCOMMITTEE ON ENVIRONMENT, ENERGY, AND NATURAL RESOURCES OF THE COMMITTEE ON GOVERNMENT OPERATIONS
HOUSE OF REPRESENTATIVES

MAY 15, 1992

Mr. Chairman and distinguished members of the Committee, it is my pleasure to come before you today to assist in your review of the operations and procedures of the Federal Energy Regulatory Commission's (FERC's) hydropower licensing program. In your letter of invitation, you inquired about several specific issues concerning the Environmental Protection Agency (EPA) and our role in State certification of Federal permits and licenses under Section 401 of the Clean Water Act (CWA). You requested that we discuss the environmental review associated with FERC's hydropower licensing process and FERC's relationship with State agencies responsible for certifying that proposed projects meet CWA requirements. In addition, a third question related to the CWA is the potential impact of legislative proposals on FERC's hydropower activities.

Let me begin today by giving a brief status of the health of our Nation's rivers. Our Nation's rivers have sustained long-term adverse impacts. The 1990 Water Quality Inventory prepared by EPA based on State reports under Section 305(b) of the CWA, indicates that only 63 percent of assessed rivers are considered "swimmable and fishable." The most extensive causes of impairment to our Nation's rivers, cited in the Section

305(b) report, were siltation, nutrients, low dissolved oxygen, and pathogens. Agricultural runoff was the most extensive source of pollution; however, hydrologic and habitat modification was the third leading source of impairment of our Nation's rivers. Sometimes the effect of pollution sources is the alteration of natural flow regimes, which may adversely affect habitat and fishery resources. One example of this effect on a fishery is the Columbia River System, which has the largest dam system for electric power in the world. Anadromous fish runs in the Columbia and Snake River Basins are now estimated to be less than 25% of levels that would have been expected without the dams.[1]

A recent study by the American Fisheries Society's Endangered Species Committee found nearly one-third of native North American freshwater fish species are endangered, threatened, or of special concern and 93 percent of these have been adversely affected by habitat loss. This same report, indicated that one-tenth of the species of freshwater mussels has become extinct. Approximately 73% of the remaining species are considered rare or imperiled due primarily to habitat destruction from pollution from a number of sources, including dam construction.

The stated goal of the CWA is to restore and maintain the chemical, physical and biological integrity of the Nation's waters. The CWA authorizes adoption of water

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[1] Northwest Power Planning Council, Impacts and Implications of the Pacific Northwest Power Bill (Rep. No. EMD-79-105, 1979).

quality standards addressing all three of the characteristics of high quality waters – not only chemical integrity, but also the integrity of biological resources and the physical integrity of the water body. One valuable tool to protect the health and viability of our Nation's waters is Section 401 of the CWA which provides for State water quality certification. States are authorized to issue, condition, deny, or waive certification of certain Federal permits or licenses that may affect the physical, chemical, or biological integrity of our waters. In a few exception/ cases, EPA is responsible for the certification. Currently, EPA has this responsibility for the State of South Dakota, some Indian tribes and for one specific hydropower project in Maine where State legislation precludes Maine from applying its water quality standards to the project. Section 401(a) also gives EPA specific responsibilities to notify other affected States and make independent recommendations to the Federal permitting or licensing agency in cases where a discharge may affect the waters of any State other than the State in which the discharge originates. In *Arkansas v. Oklahoma* (1992), the U.S. Supreme Court held that the Clean Water Act allows EPA to require that point sources in upstream States not violate water quality standards in downstream States. The court declined however, to address the question of whether the CWA *mandated* EPA to apply standards of downstream States; it merely stated EPA had the authority to do so under the CWA.

Section 401 certifications are based on State water quality standards. If a permit or license does not ensure compliance with State water quality standards, certification can be denied or be conditioned. EPA regulations,

implementing Section 303(c) of the CWA, require States to adopt standards with three basic components. First, the States are to designate the uses it wishes to protect for each of its waters. (For example, drinking water supply, support of fish and wildlife, recreation, irrigation, etc.) Second, the State is to adopt criteria to protect those uses. Criteria may be numeric or narrative and may relate to chemical, biological or physical characteristics of the water. Finally, the State must adopt an antidegradation policy to protect its high quality waters. EPA regulations direct that wherever the goal is attainable, States must strive to achieve fishable swimmable water quality (i.e., they must designate beneficial uses that meet the CWA goal of protecting the propagation of fish, shellfish, and wildlife, and providing for recreation in and on the water).

Most States currently have established narrative descriptions of the conditions to be achieved and chemical-specific numeric criteria for the water column. EPA has recently begun to emphasize that, as information permits, States should also include more specific criteria for habitat protection, criteria to help prevent contamination of sediments, and criteria for the protection of wildlife. For example, States would be encouraged to address physical impairment resulting from sedimentation that covers ripple pools, thereby eliminating spawning habitat for cold water fisheries. Temperature standards are sometimes needed because industrial discharges with elevated temperature may decrease natural dissolved oxygen levels resulting in fish kills. Water quality standards are usually designed to protect biological resources. Hydromodification may result in standards violations, if for

example, a flowing stream turns into a reservoir changing the biological community that previously existed, thereby in manner inconsistent with the designated use, it is important for States to set their own goals as they establish standards for ecological protection.

The CWA requires States to review and revise, if necessary, their water quality standards at least once every three years. EPA publishes annual guidance for current and upcoming triennial reviews of State water quality standards. For FY 91-93, the reviews are focusing on: (1) adopting criteria to protect aquatic life and human health from toxic pollutants; (2) adopting narrative biological criteria and salt water criteria; (3) to identify adopting implementation procedures for antidegration [sic] polices; and (4) adopting narrative standards that apply to wetlands. In the FY 94-96 triennium, the reviews will focus on adopting numeric biological criteria, sediment criteria, and special consideration of wet weather standards. It is anticipated that both narrative and numeric criteria will continue to be used, as appropriate, in State water quality standards.

As I already noted, the CWA and EPA regulations require that States adopt antidegradation policies that not only protect existing uses and existing water quality, but also protect high quality and ecologically unique waters, some of which may be outstanding national resource waters, and wetlands. Such State antidegradation policies are an integral part of water quality standards and are therefore an integral part of State § 401 certifications. These antidegradation policies could give States the ability to prevent, for example, the changing of a trout stream

into a reservoir that would support different uses, such as habitat for carp and catfish.

EPA assists and guides the States in implementing the certification provisions of CWA Section 401. EPA provides grant support to improve State 401 programs; guidance on the use of the Section 401 certification process to protect all types of waters including wetlands; and technical comments on the potential environmental impacts of individual projects.

EPA, as the principal agency responsible for administering the CWA, has taken steps to support States as they consider the full range of water quality impacts when evaluating Federal permits under Section 401 and licenses, including hydropower licenses. The types of potential adverse impacts associated with hydropower projects include loss or degradation of aquatic habitat; impacts on wildlife, fisheries, and endangered species that are dependent upon the aquatic environment; accumulation of contaminated sediments; nonpoint source impacts; water chemistry problems such as low levels of dissolved oxygen; significant changes in temperature; and significant changes in water flow volumes and timing.

The Federal Energy Regulatory Commission (FERC) has questioned the extent of a state's Section 401 authority. Courts have been divided on this issue. In a July 25, 1990 letter to EPA, FERC indicated that conditions on Section 401 certificates that would protect existing uses such as fisheries were unrelated to water quality.

States have indicated that their ability to maintain water quality and to protect drinking water, fisheries,

aquatic habitats and other beneficial uses will be severely undercut if their authority to certify FERC licenses under Section 401 is limited. In separate letters to EPA, the States of Maine and Vermont raised concerns about FERC's challenge to State authority under Section 401 to consider the full range of water quality impacts, other than water column chemistry. In a September 25, 1990, letter to EPA, the State of West Virginia raised a related concern that FERC has been reluctant to accept water quality recommendations for license conditions and in some cases issued project licenses inconsistent with the State's recommendations. Another issue of concern to the States is the sometimes sporadic enforcement of Section 401 conditions on FERC licenses. For example, FERC may choose to make Section 401-imposed flow numbers a part of the license and enforce the numbers, but choose not to enforce the installation of downstream fish screens. However, Section 401(d) is explicit that State conditions shall become a part of the Federal permit or license. As such, FERC should be prepared to enforce all conditions of its licenses.

In response to these State concerns, EPA wrote FERC on January 18, 1991 and stated that the CWA mandate to restore and protect the "chemical, physical, and biological integrity of the nation's waters" involves more than just addressing the chemistry of the water column. Protecting water quality means protecting the entire aquatic system including aquatic life, wildlife, wetlands and other habitats, vegetation, and hydrologic conditions. Toxicity and bioaccumulation of pollutants, the diversity and composition of aquatic species, entrapment of pollutants in sediment, significant changes in temperature, stormwater and

other nonpoint source impacts, habitat loss and degradation, and hydrologic changes are all relevant water quality issues.

Under Section 404 of the CWA, EPA also has certain responsibilities related to licensing of hydropower projects that involve the discharge of dredged or fill material into waters of the United States. This would apply only rarely in relicensing situations, where there is already an existing dam, but new dams generally need to be permitted under Section 404. The Army Corps of Engineers (Corps) issues Section 404 permits using environmental guidelines developed by EPA in conjunction with the Corps. EPA also reviews proposed permits; prohibits discharges with unacceptable adverse environmental impacts (the Section 404(c) "veto" authority); pursuant to Congressional authority, interprets the jurisdictional scope of waters of the United States; through regulation, interprets exemptions to Section 404; and shares enforcement authority with the Corps. The Corps has issued a nationwide permit (33 CFR, Part 330) covering discharges of dredged or fill material associated with small (less than 5 Megawatts of generating capacity) hydropower projects licensed by FERC. The nationwide general permit helps to reduce time and effort associated with permitting new projects. The timing of Section 404 review varies within the FERC licensing process for individual projects. Sometimes the applicant initiates the Section 404 application at the same time as the FERC application; sometimes the Section 404 application is submitted after FERC license approval.

All of these environmental issues and others are usually evaluated by FERC in environmental impact statements and environmental assessments prepared pursuant to the National Environmental Policy Act (NEPA). EPA conducts environmental reviews of FERC's hydropower licenses pursuant to Section 102(2)(C) of NEPA and Section 309 of the Clean Air Act (CAA). These laws establish EPA's responsibility to review and comment upon the "environmental impact of any matter relating to EPA's duties and responsibilities." In this context, EPA reviews environmental documents for a wide variety of projects. We may make recommendations which may increase projects costs, and yet these recommendations are intended to preserve current and future societal benefits produced by the natural resources EPA's recommendations are designed to protect. All relevant benefits and costs are appropriate to consider in the decision-making process. Furthermore, Section 309 requires that, when the Administrator determines that any Federal agency's legislation, action or regulation falling under the purview of the EPA review responsibilities is "unsatisfactory from the standpoint of public health or welfare or environmental quality, he shall publish his determination and the matter shall be referred to the Council on Environmental Quality." While Section 309 is part of the CAA it is not restricted to air quality issues; rather, it applies to all facets of EPA's mission to protect the environment. Through its environmental reviews, EPA strives to ensure that other agencies' policies, programs, and projects not

only comply with environmental laws but also with the general spirit embodied in Section 101 of NEPA.[2]

It is our understanding that by the year 1999, 335 FERC licenses for existing hydropower projects will expire; 167 of those projects are due for relicensing prior to 1993. The projects are located on 105 rivers in 24 States. Most of these projects are in northeastern and midwest states. All of these projects will require NEPA compliance. EPA has met with FERC several times in the past six months to discuss its implementation of NEPA and coordination between our Agencies. To facilitate more efficient and expeditious licensing, FERC needs to incorporate NEPA at an early stage in the application process for its licenses. FERC has indicated that using third party contractors would enable them to integrate NEPA into their licensing process more effectively. With proper safeguards, EPA would support FERC's use of contractors.

EPA supports efficient licensing for hydropower projects and believes that a signed agreement between EPA and FERC describing how EPA's environmental review role links with FERC's procedures could speed the licensing process. A good model might be the interagency Agreement that Department of Army, EPA and the Department of Transportation recently signed to help

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[2] Section 101 of NEPA urges that the Federal government use all practicable means "to foster and promote general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans."

integrate NEPA and Section 404 reviews at an early stage in the transportation planning process. This agreement followed issuance of a document entitled "Applying the Section 404 Permit Process to Federal-Aid Highways Projects", developed cooperatively among a number of Federal agencies. Both EPA and the Corps have recently suggested to FERC that a similar document be developed for hydropower licensing.

Although FERC is reluctant to adopt certain 401 certificate conditions in it licenses, FERC does its own review beyond chemical criteria and additionally consider [sic] biological and physical impacts on the Nation's waters. In order to address EPA concerns about the potential environmental impacts of removing all hydropower proposals less than of 5 Megawatts from FERC regulation, the Administration's proposed energy legislation would require that these projects would still be subject to sections [sic] 401 certifications. We strongly believe that Section 404 requirements should govern issuance of FERC licenses.

Thank you for the opportunity to comment. I would be happy to answer any questions you may have.
